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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

INDIANA EMPLOYMENT SECURITY DIVISION, *et al.*,
Appellants,

—against—

ESSIE B. BURNEY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA FORT WAYNE DIVISION

MOTION FOR PERMISSION TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF NATIONAL EMPLOYMENT LAW PROJECT, *ET AL.* AS *AMICI CURIAE*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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FORT WAYNE DIVISION

MOTION FOR PERMISSION TO FILE BRIEF *AMICI CURIAE*

The National Employment Law Project, Community Action for Legal Services, Inc. of New York, the Legal Aid Bureau, Inc. of Baltimore, the Legal Aid Bureau of Buffalo, Inc., the Legal Aid Society of Cleveland, the Legal Aid Society of Metropolitan Denver, the Legal Services Center of Seattle, the Michigan Legal Services Assistance Program and the Neighborhood Legal Aid Society, Inc. of Richmond respectfully move this Court for leave to file the accompanying Brief *Amici Curiae*. The consent of the Appellee to the filing of this brief has been obtained, but the Appellants have refused to consent to its filing.

The *amici* are interested in this case because each of the *amici* is a Legal Services Office (hereafter "Legal Services Office") funded by the United States Office of Economic Opportunity and each devotes its full time to the representation of indigent individuals. Indigent clients bring numerous unemployment insurance cases to Legal Services Offices, often after benefits have been terminated without hearing, with the result that Legal Services Offices devote a very substantial amount of time to the representation of indigent unemployment insurance recipients.*

The summary termination of unemployment insurance benefits works a major hardship on these unemployment insurance recipient clients. Because the average wage in the United States in employment covered by unemployment insurance was but $141.09 per week in 1970,** and because, when one becomes unemployed, this income is replaced with a benefit which, in 1970, equalled, on the average, but 35.7% of the earned wage*** and because even this modest benefit is eliminated by summary benefit terminations, the *amici* frequently find themselves representing desperately

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* In Maryland, when unemployment insurance recipients receive notice of adverse action they also receive a notice (Form FSA-801) informing them that they may be entitled to free legal assistance, together with the addresses of the offices of the *amicus*, Legal Aid Bureau, Inc. of Baltimore.

Approximately 25% of the case load of the National Employment Law Project is made up of unemployment insurance matters in which it is cooperating with local Legal Services Offices.

** See United States Department of Labor *Handbook of Unemployment Insurance Financial Data 1938-1970* (hereafter *"1971 Handbook"*) at 139 (1971).

*** *1971 Handbook* at 139.

poor clients whose benefits have been terminated without a hearing.

The summary termination of benefits imposes additional financial burdens on those whose financial resources are greatly reduced by unemployment. The additional legal impediment imposed by shifting to the recipient the burden of securing a reversal of a summary adverse decision cannot be justified in these circumstances. For these reasons the *amici* urge affirmance of the decision below.

Respectfully submitted,

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FORT WAYNE DIVISION

BRIEF OF THE NATIONAL EMPLOYMENT LAW PROJECT, *ET AL.*, AS *AMICI CURIAE*

Interest of the *Amici*

The interest of the *amici* is fully set out in the Motion for Permission to file this Brief *Amici Curiae*. *Amici* are Legal Services Offices, funded by the United States Office of Economic Opportunity. Because *amici* represent indigents, exclusively, they devote a substantial amount of time to representing unemployment insurance recipients.

Summary of Argument

In *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971), this Court concluded that 42 U.S.C. §503(a)(1), which requires the payment of unemployment insurance benefits "when due," operates to prevent the states from terminating unemployment insurance payments when an employer demands a hearing. The court below has correctly interpreted *Java* to require the Appellants to conduct hearings prior to the termination of benefits previously found due. That court's decision was correct because:

(1) Unemployment insurance benefits are a statutory entitlement in which recipients have a property right.

(2) Congress, in adopting the unemployment insurance program, manifested its concern that benefits be paid as soon as possible after unemployment begins and during the period of unemployment. These objectives are frustrated by the long delay between a decision to terminate and a testing of the correctness of that decision in a hearing. Congress required that such hearings be "fair hearings" [See 42 U.S.C. §503(a)(3)], and thus has compelled the states to provide due process hearings which are, by definition, prior hearings.

(3) Informal and summary proceedings such as those presently in use in Indiana are not adequate to satisfy the requirement that benefits be terminated only in fair hearings.

The decision of the court below should also be affirmed because the Fourteenth Amendment to the United States

Constitution requires hearings prior to unemployment insurance benefit terminations and the present summary procedure used by the Appellants for such terminations does not meet the requirements of that Amendment.

ARGUMENT

I.

The termination of unemployment insurance benefits without a prior hearing violates controlling provisions of the Social Security Act.

A. *The Requirements of the Social Security Act.*

This Court has repeatedly recognized that states receiving reimbursement for social welfare programs pursuant to the Social Security Act must conform to the requirements of the Act in administering those programs. See, e.g., *Carleson* v. *Remillard*, —— U.S. ——, 92 S. Ct. 1932 (1972); *Townsend* v. *Swank*, 404 U.S. 282 (1971); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); *King* v. *Smith*, 392 U.S. 309 (1968). And, in *California Department of Human Resources Development* v. *Java*, 402 U.S. 121 (1971), it has specifically applied that principle to states administering programs under Title III of the Act, which establishes unemployment insurance benefits.

In *Java*, of course, the Court dealt with one section of the Act at issue in this case and held that that section, §303(a)(1), operates to prevent the states from terminating unemployment insurance benefits upon a mere demand for a hearing by an employer.

Section 303(a) provides that the Secretary of Labor shall not certify payment of funds for the administration of a

state unemployment insurance program unless the law of that state includes provision for:

> "(1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due."
>
> • • • • •
>
> "(3) Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unemployment compensation are denied." Social Security Act §303(a) [42 U.S.C. §503(a)].

In commenting on Section 303(a)(1) in *Java,* this Court stated:

> "Other evidence in the legislative history of the Act and the commentary upon it supports the conclusion that 'when due' was intended to mean at the earliest stage of unemployment that such payments were administratively feasible after giving both the worker and the employer an opportunity to be heard." 402 U.S. at 131.

In the case at bar, the Appellee has successfully challenged, in the court below, the practice of the Indiana Employment Security Division of terminating unemployment insurance benefits, already found to be "due," within the meaning of the Act and *Java,* without first holding a hearing. The decision of the court below was correct because:

> (1) Unemployment insurance is a statutory entitlement which becomes "due" when there has been an initial determination of eligibility.

(2) The requirement that benefits must be paid "when due" and the requirement that persons denied unemployment insurance be given "fair hearings" operate to require a hearing prior to termination.

(3) The present procedure for determining an issue of continuing eligibility does not provide the prior fair hearing contemplated by the Social Security Act.

B. *Unemployment Insurance Is a Statutory Entitlement and Property Right Which Becomes "Due" When There Has Been an Initial Determination of Eligibility.*

When the Social Security Act was first brought to the floor of the House in 1935, the then Chairman of the House Ways and Means Committee had the following to say about the unemployment insurance program:

> "The advantages of social insurance over public relief are many. It does not carry with it the stigma of charity with its devastating effect on the morale of our population and its loss of self-respect. *The protection afforded by social insurance comes to the worker as a matter of right.* It is contingent upon the previous employment and contributions of the worker himself and does not involve the social investigation and the means test which is inevitable in any system of public relief." 79 Cong. Rec. 5468 (1935) (remarks of Representative Doughton) (emphasis supplied).

Unemployment insurance was also characterized as a "contractual right" when it was introduced. See Report of the Committee on Economic Security, *Hearings on S. 1130 before Senate Comm. on Finance*, 74th Cong. 1st Sess. at 321-22 (1935) [hereafter cited as *"1935 Hearings"*].

As recently as 1970, Congress, addressing the Employment Security Amendments of 1970 (Pub. L. No. 91-373, 84 Stat. 695), reiterated this basic concept of unemployment insurance:

> "The Committee believes that the disqualification provisions of State unemployment compensation laws should be devised so as to prevent benefit payments to those responsible for their own unemployment, without undermining the basic objective of the unemployment insurance system—to provide an income floor to those whose unemployment is beyond their control. *Severe disqualifications, particularly those which cancel earned monetary entitlement, are not in harmony with the basic purposes of an unemployment insurance system.* Most disqualifications under State law provisions are applied for voluntary terminations without good cause (frequently cause must be attributable to an employer), or for refusals of suitable work. Such a situation may represent an error in judgment on the part of the worker, or be the result of circumstances over which he had no control. The penalty for a disqualifying act should not be out of proportion to the disqualifying act." *Report of the Senate Finance Comm. on the Employment Security Amendments of 1970,* S. Rep. No. 91-752, 91st Cong., 2d Sess. at 24.

Virtually identical language appears in the *Report of the House Comm. on Ways and Means on the 1970 Employment Security Amendments.* H.R. Rep. No. 612, 91st Cong., 1st Sess. at 19.[1] Congress in 1970, as in 1935, viewed unem-

[1] It is worthy of note that the provision curtailing the ability of the states to completely cancel unemployment insurance credits to which both the Senate and House Committees were addressing themselves was eventually enacted. See Int. Rev. Code of 1954 §3304 (a)(10).

ployment insurance, even more than the AFDC program (42 U.S.C. §§601 *et seq.*) at issue in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), as a matter of statutory right. Accordingly, Congress requires payment of benefits "when due" and the states implement this requirement by providing for an initial determination of eligibility that initiates benefit payments. See *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 127 (1971).

Indiana, like other states, follows the Social Security Act and creates a statutory entitlement to benefits. The court below specifically found that the initial determination was the critical point in the Indiana procedure and that:

> "Even though defendants review on a weekly basis the eligibility of a claimant, the court finds that the concept of when benefits are 'due' under the Social Security Act does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility. The court thus finds that plaintiff Burney's benefits were 'due' and could not be summarily suspended due to a deputy's determination of ineligibility under §52-1542a(d). Having been found eligible pursuant to the procedures set forth in §52-1542a, plaintiff Burney was entitled to benefits until defendants afforded her a hearing. To conclude otherwise would frustrate the purpose of early substitute compensation during unemployment under §303(a)(1) of the Social Security Act. See *Java, supra* at 1355." Memorandum of Decision and Order, Jurisdictional Statement at A-1, A-9–A-10.

Indiana has established a right to unemployment insurance, as it must, to conform to the Social Security Act. This

right is a statutory entitlement and a property right; it becomes due after there has been an initial determination of eligibility.

C. *The Requirements That Benefits Be Paid "When Due" and That Those Denied Benefits Be Given "Fair Hearings" Require Hearings Before Benefit Termination.*

1. Congress intended that unemployment insurance benefits would be paid during the period of unemployment to provide a source of income other than welfare for the unemployed, to stabilize the economy and to allow the unemployed to search for work.

As this Court has noted, in requiring that benefits be paid "when due," Congress intended that unemployment benefits be paid *during* the period of unemployment. *California Department of Human Resources Development* v. *Java*, 402 U.S. 121, 130 (1971). The Brief *Amicus Curiae* submitted by Harry T. Ice and Charles T. Todd on behalf of a group of Indiana employers, the Indiana State Chamber of Commerce and the Indiana Manufacturers Association (hereafter the "Employers") points out that the delay between benefit denial and the holding of a hearing and resolution of any appeal from the hearing decision is *longer* than the average period of unemployment in Indiana.[2] See

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[2] There is some disparity between the 5.7 weeks set out at p. 11 of the Employers' Brief *Amicus Curiae* as the average duration of unemployment during 1969 and the 8.2 weeks set out as the 1969 average in the *1971 Handbook* at 206. In any event, a substantial portion of the eligibility period is consumed awaiting a final adjudication of eligibility. In Indiana, 63.7% of the cases remained undecided 75 days after a request for hearing in the period January—March, 1972. United States Department of Labor, *Unemployment Insurance Statistics* at 9 (May 1972). The Indiana situation is not unique. In New York, in the period January to March, 1972, 74.2% of the cases in which hearings were sought involved delays in excess of seventy-five days, see United States

Employers' Brief *Amicus Curiae* at 11. From these statistics, the Employers conclude that the recipient should not be allowed to receive benefits pending the hearing because many recipients would thus be allowed to receive benefits throughout their periods of unemployment.[3] Employers' Brief *Amicus Curiae* at 11. Quite the contrary, these statistics demonstrate that those summarily terminated in Indiana do not receive *any* benefits during the very time that Congress intended that they should have benefits. Unemployment compensation was intended to provide compensation *during the period of unemployment.* Its purpose is to "... provide cash to a newly unemployed worker 'at a time when otherwise he would have nothing to spend,' serving to maintain the recipient at subsistence levels without the necessity of his turning to private charity." *Java, supra,* 402 U.S. at 131-32. A lump sum award, after hearing and often after unemployment has ended, conflicts with this goal.

Congress intended to create an entitlement to benefits to be paid during periods of unemployment, Congress did not intend that those eligible for unemployment insurance would resort to welfare,[4] the inevitable result of the

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Department of Labor, *Unemployment Insurance Statistics* at 9 (May 1972); and the average duration of unemployment was 12.9 weeks during 1969 (13.6 weeks during 1970), *1971 Handbook* at 278.

[3] The period of time that elapses between the hearing and appeal is actually irrelevant since Appellees seek only one hearing prior to termination.

[4] See *supra* at p. 9. In *Torres* v. *New York State Department of Labor,* 321 F. Supp. 432, 437 (S.D.N.Y.), *vacated and remanded,* 402 U.S. 968, *opinion on remand,* 333 F. Supp. 341 (S.D.N.Y. 1971), *aff'd without opinion,* 405 U.S. 949, *petition for rehearing filed* (March 24, 1972), in its first opinion, the majority of the court relied heavily on the availability of welfare to those denied unemployment insurance benefits. See *infra* at p. 26.

denial of unemployment insurance to those without incomes adequate to the amassing of the savings necessary for self-support during periods of enforced unemployment.[5]

A further indication of the importance of this goal is found in the fact that Congress intended that benefits would be paid during periods of unemployment in order to stabilize the economy by maintaining the purchasing power of workers:

> "The chief merit of unemployment insurance, however, is that it will exert a profound influence upon the stabilization of industry . . . . The transfer of purchasing power by benefit payments when danger threatens will float the business ship off the shoals of depression to the seaway of prosperity." *1935 Hearings* at 2. (Statement of Senator Robert F. Wagner, Sponsor of the Social Security Act.)

This Court also noted, in *Java*, this central purpose of unemployment insurance and that this purpose was among those defeated by delayed compensation. 402 U.S. at 132-33.

Congress also emphasized its concern that benefits be paid during unemployment by articulating the principle that benefits should be used to allow the unemployed worker to search for work:

> "This [the Act] covers a great many thousands of people who are thrown out of work suddenly. It is essential that they be permitted to look for a job. They should not be doing anything else but looking for a job.

---

[5] The average income in employment covered by unemployment insurance was $141.09 in 1970 in the United States; in Indiana it was $143.81. *1971 Handbook* at 139.

We felt that in that period of 2½ to 3 months the beneficiaries should get an insurance benefit in cash." *Hearings on H.R. 4120 Before the House Committee on Ways and Means,* 74th Cong., 1st Sess. at 214 (1935) (statement by Harry L. Hopkins, Federal Emergency Relief Administrator).

The summary termination of benefits also contavenes this policy.

The long delay between a summary termination of benefits and the testing of the accuracy of that determination, in a hearing, defeats the goal of early payment of benefits during unemployment. Benefits are found to be due in the initial determination; Congress established a requirement that any denial of benefits be tested by a fair hearing [Social Security Act §303(a)(3)]; it did not intend that recipients, frequently eligible under the standards eventually applied in such hearings, would be forced to do without benefits due, often throughout the period of actual unemployment, while awaiting that test.

The policy of postponing payment of benefits pending the hearing required by the Act frustrates the three most important purposes of unemployment insurance: providing subsistence income during unemployment, stabilizing the economy and allowing maximum ability to search for work.

2. Congress intended that recipients be provided hearings prior to benefit termination.

Congress explicitly enjoined the states to provide:

"Opportunity for a fair hearing, before an impartial tribunal, for all individuals whose claims for unem-

ployment compensation are denied . . . ." 42 U.S.C. §503(a)(3).

The phrase "fair hearing," as it is found in other Titles of the Social Security Act has been interpreted authoritatively by the United States Department of Health, Education and Welfare ("H.E.W.") to require a prior hearing. In Title III, unemployment insurance, the phrase has not been so interpreted by the United States Department of Labor.

Even before this Court's decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), H.E.W. had proposed to interpret the fair hearing provisions of Titles I, IV-A, X, XIV, XVI and XIX of the Social Security Act to require continued payment of benefits pending the fair hearing decision. See 397 U.S. 254, 257 fn. 3. That interpretation has now been adopted, see 45 C.F.R. Part 205,[6] and judicially approved. *Almenares* v. *Wyman*, 334 F. Supp. 512 (S.D.N.Y.), *aff'd*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972). Titles I, IV-A and X were each part of the original Social Security Act of 1935—as was Title III. Congress

[6] Each of the Titles of the Act to which the proposed regulation and the present 45 C.F.R. Part 205 apply contains a provision for a fair hearing. See Social Security Act §§2(a)(4) [42 U.S.C. §302(a)(4)] (Old Age Assistance), 402(a)(4) [42 U.S.C. §602(a)(4)] (Aid to Families with Dependent Children), 1002(a)(4) [42 U.S.C. §1202(a)(4)] (Aid to the Blind), 1402(a)(4) [42 U.S.C. §1352(a)(4)] (Aid to the Totally and Permanently Disabled), 1602(a)(4) [42 U.S.C. §1382(a)(4)] (Aid to the Aged, Blind or Disabled), 1902(a)(3) [42 U.S.C. §1396a(a)(3)] (Medical Assistance). Title II of the Act (Old-Age, Survivors, and Disability Insurance) does not use the phrase "fair hearing" but does require " . . . reasonable notice and opportunity for a hearing . . . ." Social Security Act §§205(b), 221(d) [42 U.S.C. §§405(b), 421(d)]. H.E.W. has not interpreted that provision to require a full due process prior hearing. See *Wright* v. *Richardson*, 405 U.S. 208 (1972).

could only have meant to use the phrase "fair hearing" consistently.

The traditional meaning ascribed to fair and due process hearings leads inevitably to the conclusion that Congress intended the interpretation adopted by H.E.W. In Black's Law Dictionary, the phrase "fair hearing" itself is defined as a hearing comporting with the requirements of due process. And in *Fuentes* v. *Shevin*, —— U.S. ——, 92 S. Ct. 1983 (1972), this Court said:

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a *fair process* of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract *fair play* to the individual." —— U.S. at ——, 92 S. Ct. at 1994 (1972) (emphasis supplied).

When applied to adjudicatory proceedings the terms "due process" and "fairness" have virtually identical meanings. A "fair" hearing normally is a due process hearing.

In *Fuentes* it was also said that:

> "This [the right to a prior hearing] is no new principle of constitutional law. The right to a prior hearing has long been recognized by this Court under the Fourteenth and Fifth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing 'appropriate to the nature of the case,' *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, 313, and 'depending upon the importance of the interests involved and the nature of the subsequent proceeding [if any],' *Boddie* v. *Connecticut*, 401 U.S. 371, 378,

> the Court has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." —— U.S. at ——, 92 S. Ct. at 1995 (1972) (parallel citations omitted).

A hearing, if it is fair, if it is a due process hearing, is conducted before property is forfeit. See, e.g., *United States* v. *Illinois Central R.R.*, 291 U.S. 457, 463 (1934) (hearing meets due process requirements if held before order effective); *Londoner* v. *City and County of Denver*, 210 U.S. 373 (1908) (right to a hearing prior to fixing of taxes); *Hovey* v. *Elliott*, 167 U.S. 409 (1897) (absence of power in court to ignore answer of party as punishment for contempt); *Windsor* v. *McVeigh*, 93 U.S. 274 (1876) (right to hearing prior to deprivation of real property). Each of these cases was decided prior to the enactment of the Social Security Act, with its provisions for "fair hearings." Each made explicit the underlying assumption of Anglo-American adjudicatory processes—the hearing comes first, the deprivation later. See, *e.g.*, 2 F. Pollock & F. Maitland, *The History of English Law* 591-597 (2d ed. 1959). Though the legislative history of the Social Security Act is silent on the question of what, specifically, Congress had in mind when it required a "fair hearing," Congress no doubt intended to have reference to the body of law establishing the parameters of fairness imbedded in the concept of due process.

The fact that Congress was allowing delegation of an adjudicatory function to an administrative agency offers no reason to think that it was not still to be precisely that—an adjudicatory function conducted in accordance with the

essential elements of that function; not the least of which is that adjudication occurs before taking. See *Londoner* v. *City & County of Denver, supra; Windsor* v. *McVeigh, supra.* That prior hearings remained a fundamental principle of due process fairness, even after administrative agencies achieved great vogue during the era of the New Deal, is clear from an early case dealing with another administrative proceeding established by New Deal legislation, the Fair Labor Standards Act:

> "The demands of due process do not require a hearing at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 152-53 (1940).

In unemployment insurance the order becomes "effective" within the meaning of this rule when the unemployed worker, currently receiving benefits, ceases receiving benefits. Though there may later be a retroactive award of benefits withheld, the chance for compensation *during* the weeks of unemployment in which the denial was effective is lost forever.

Presumably, had Congress addressed the subject in more detail, it would have defined the fair hearing in a manner consistent with its own overriding concern with early payment of benefits during periods of actual unemployment and the long-standing tradition that a fair hearing is a prior hearing.

D. *The Present Procedure Used to Resolve an Issue of Continuing Eligibility Does Not Provide the Fair Hearing Contemplated by the Social Security Act.*

As will be seen in detail, *infra,* there are numerous guides to what constitutes a fair hearing in the context of due process. One of the most significant guides is found in *Goldberg* v. *Kelly,* 397 U.S. 254, 266 (1970): an adequate hearing is one held at a meaningful time with notice, personal appearance, cross-examination, oral presentation, option to be represented by counsel, decision based on legal rules and evidence and impartial decision-maker. The present informal interview procedures used in Indiana prior to benefit terminations do not meet these requirements. See *infra* at 29. Consequently, since Congress has required a "fair hearing" and since its model for a "fair hearing" must be found in due process hearings (see *supra* at 17), present Indiana pre-termination procedures are inadequate. While the necessity for early benefit payments justifies the less formal method of initiating benefit payments, see *California Department of Human Resources Development* v. *Java,* 402 U.S. 121, 131 (1971), there can be no justification for using such procedures to terminate benefit payments currently being made.

II.

The termination of unemployment insurance benefits without a due process hearing violates the Fourteenth Amendment to the United States Constitution.

A. *A Hearing Is Required Prior to Termination of Unemployment Benefits.*

On appeal, the Appellants and their *amici* attempt to distinguish *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and to rely on *Torres* v. *New York State Department of Labor*, 321 F. Supp. 432 (S.D.N.Y.), *vacated and remanded*, 402 U.S. 968, *opinion on remand*, 333 F. Supp. 341 (1971), *aff'd without opinion*, 405 U.S. 949, *petition for rehearing filed* (March 24, 1972), for the proposition that a due process hearing is not required prior to the termination of unemployment insurance benefits. *Torres* relied on the theory that the due process requirement of a hearing prior to the termination of public assistance in *Goldberg* v. *Kelly*, *supra*, was based solely upon the "brutal need" of the recipients; that unemployment insurance recipients do not experience such "brutal need"; and that hearings, therefore, are not required prior to termination of unemployment insurance benefits. This theory has been specifically rejected by three United States District Courts[7] because

[7] The theory has been rejected by the three-judge courts in *Java* v. *California Department of Human Resources*, 317 F. Supp. 875 (N.D. Cal. 1970) *affirmed on statutory grounds*, 402 U.S. 121 (1971), and *Wheeler* v. *Vermont*, 335 F. Supp. 856 (D. Vt. 1971), and by a single-judge court in *Crow* v. *California Department of Human Resources*, 325 F. Supp. 1314 (N.D. Cal. 1970), *appeal docketed*, Nos. 71-1045 and 26740 (9th Cir. January 11, 1971), *motion to expedite and for consolidation with No. 71-1119 denied*, ——U.S. ——, 92 S. Ct. 2046, *cert. denied*, —— U.S. ——, 92 S. Ct. 2495, *order postponing judgment entered* (9th Cir. July 17, 1972).

it is based on a misunderstanding of decisions of this Court and the history of due process.

In determining whether a hearing must be given prior to the termination of an interest, this Court has traditionally followed a two-step process. First, in order "to determine whether due process requirements apply in the first place, we must look not to the 'weight' but to the *nature* of the interest at stake." *Board of Regents of State College* v. *Roth,* —— U.S. ——, ——, 92 S. Ct. 2701, 2705-06 (1972) (emphasis in original). Second, once a protected interest has been found, a prior hearing is required unless there is found one of those " 'extraordinary situations' that justify postponing notice and opportunity for a hearing" until after the termination or taking has occurred. *Fuentes* v. *Shevin,* —— U.S. ——, ——, 92 S. Ct. 1983, 1999 (1972) (citation omitted). Thus, if the *nature* of the interest is sufficient to invoke due process protection, a hearing is constitutionally mandated prior to the termination of the interest unless an extraordinary situation dictates the postponing of such a hearing.

The nature of the interest in the instant case is the right to unemployment insurance benefits which have been determined to be due to the recipient. The nature of this interest was long ago held sufficient to invoke constitutional protections. *Sherbert* v. *Verner,* 374 U.S. 398 (1963). More recently, this Court, citing *Sherbert* v. *Verner, supra,* used unemployment insurance benefits as an example of a constitutionally protected interest:

> "Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation." *Goldberg* v. *Kelly,* 397 U.S. 254, 262 (1970) (citations omitted).

Indeed, this Court has determined that interests much less compelling than the right to receive unemployment benefits are subject to due process protections. In *Fuentes* v. *Shevin*, —— U.S. ——, 92 S. Ct. 1983 (1972) it was held that possessory interests in chattels (a stove and a stereo) were of sufficient import to invoke the protection of due process. In *Bell* v. *Burson*, 402 U.S. 535 (1971) it was held that possession of a driver's license was sufficient to invoke due process protections. And in *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) it was held that a person's reputation in the community was sufficient to invoke due process protections.

The second step in determining whether a prior hearing must be given rests upon a determination of whether or not there is an extraordinary situation necessitating an immediate taking of property and a postponement of notice and hearing. As stated in *Fuentes* v. *Shevin*, —— U.S. ——, 92 S. Ct. 1983, 1999 (1972) these extraordinary situations "must be truly unusual." Under the guidelines discussed by this Court, very few truly unusual situations have been found to necessitate the postponement of notice and hearing. See, e.g., *Ewing* v. *Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950) (emergency protection of the public from misbranded drugs); *Fahey* v. *Mallonee*, 332 U.S. 245 (1947) (protection of the public against the economic disaster of a bank failure); *Phillips* v. *Commissioner of Internal Revenue*, 283 U.S. 589 (1931) (need of the government to promptly secure its revenues); *Central Union Trust Co.* v. *Garvan*, 254 U.S. 554 (1921) (emergency needs to meet the national war effort); *North American Cold Storage Co.* v. *Chicago*, 211 U.S. 306 (1908) (emergency protection of the public from misbranded foods).

In sharp contrast to these extraordinary situations is the general principle that due process requires notice and hearing prior to the taking or termination of an interest. See, e.g., *Morrissey* v. *Brewer*, —— U.S. ——, 92 S. Ct. 2593 (1972) (notice and hearing prior to revocation of parole); *Fuentes* v. *Shevin*, —— U.S. ——, 92 S. Ct. 1983 (1972) (notice and hearing prior to repossession of household goods); *Stanley* v. *Illinois*, 405 U.S. 645 (notice and hearing prior to denial of guardianship to unwed father); *Bell* v. *Burson*, 402 U.S. 535 (1971) (notice and hearing prior to revocation of driver's license); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (notice and hearing prior to labeling a person as a heavy drinker); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (notice and hearing prior to termination of public assistance benefits); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (notice and hearing prior to wage garnishment); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965) (notice and hearing prior to adoption by another of legitimate father's child); *Londoner* v. *City and County of Denver*, 210 U.S. 373 (1908) (notice and hearing prior to special tax assessment); cf. *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126 (1940); *United States* v. *Illinois Central R.R.*, 291 U.S. 457 (1934). In short, this Court "has traditionally insisted that, whatever its form, opportunity for that hearing must be provided before the deprivation at issue takes effect." *Fuentes* v. *Shevin*, —— U.S. ——, ——, 92 S. Ct. 1983, 1995 (1972).

Despite the clear rationale of these decisions, the Appellants rest their case on an attempt to distinguish *Goldberg* v. *Kelly, supra*, through reliance on *Torres* v. *New York State Department of Labor, supra*, which in turn had held *Goldberg's* finding of the "brutal need" of public assistance

recipients was not applicable to unemployment insurance recipients. As noted pp. 21-22, *supra,* such a finding of brutal need is irrelevant to both the nature of the interest protected and the due process requirement of a *prior* hearing. If any doubt remained on this point, it was eliminated by the decision in *Fuentes* v. *Shevin, supra.* The lower courts in *Fuentes* had construed *Sniadach* and *Goldberg* narrowly as holding that due process required prior hearings only with respect to the deprivation of "necessary" items such as wages and public assistance benefits, —— U.S. at ——, 92 S. Ct. at 1998. Reversing the lower courts, this Court rejected their narrowly drawn rationale:

> "This reading of *Sniadach* and *Goldberg* reflects the premise that those cases marked a radical departure from established principles of procedural due process. They did not. Both decisions were in the mainstream of past cases, having little or nothing to do with the absolute 'necessities' of life but establishing that due process requires an opportunity for a hearing before a deprivation of property takes effect . . . . While *Sniadach* and *Goldberg* emphasized the special importance of wages and welfare benefits, they did not convert that emphasis into a new and more limited constitutional doctrine.
>
> "Nor did they carve out a rule of 'necessity' for the sort of nonfinal deprivations of property that they involved. That was made clear in *Bell* v. *Burson, supra,* holding that there must be an opportunity for a fair hearing before mere suspension of a driver's license. A driver's license clearly does not rise to the level of 'necessity' exemplified by wages and welfare benefits. Rather, as the Court accurately stated, it is an 'im-

> portant interest,' entitled to the protection of procedural due process of law." —— U.S. at ——, 92 S. Ct. at 1998 (footnotes and citations omitted).

Even if "need" were to play a significant role in deciding whether or not unemployment insurance recipients are entitled to due process, need is, beyond doubt, present. First, this Court has noted that need is present in the unemployment insurance scheme. *California Department of Human Resources Development* v. *Java,* 402 U.S. 121, 130 (1971).

Second, unemployment insurance recipients receive low incomes, see n. 5, *supra,* and the unemployment insurance benefit itself is quite low. See *1971 Handbook* at 139. The result is that recipients reduce their expenditures, particularly expenditures for food [see P. Klein, *Financial Adjustments to Unemployment* 35, 50 (1965)], and the unemployed often suffer defaults on other obligations [see Note, *The Relationship of Unemployment to Mortgage Foreclosures,* 86 Monthly Lab. Rev. 1421-22 (1963)]. From the recipient's perspective, the need for support during unemployment makes very real the general social need that motivated the enactment of the unemployment insurance system:

> "It is sometimes said that unemployment insurance is not based on need. Stated thus, without qualification, the proposition contains a grave error. Unemployment insurance is a compulsory governmental program, and in our society we make use of governmental compulsion only when there is clear and urgent need for it.
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"If in 1935 we had not judged that there existed a need which individuals were incapable of meeting by themselves, unemployment insurance would not have been established. . . . " Becker, *The Adequacy of Benefits in Unemployment Insurance* in *In Aid of the Unemployed,* 80-81 (Becker ed. 1965).

Third, public assistance is an inadequate alternative to unemployment insurance. Of the federal categories of public assistance established by the Social Security Act and supported from general tax revenues, only one, Aid to Families with Dependent Children (42 U.S.C. §§601 *et seq.*) (hereafter "AFDC"),[8] is generally available to those who are capable of working.[9] In September, 1971, twenty-five states, including Indiana, did not make this program available to persons in families in which an unemployed father remained in the home. United States Department of Health, Education and Welfare, *Public Assistance Statistics,* at Table 8 (September, 1971). Consequently, the families of unemployed fathers would not be eligible for AFDC in those states. That this results in many denials to those whose unemployment insurance is terminated is suggested by the fact that, in the month of February, 1972, 67.2% of all unemployment insurance claimants were male. United States Department of Labor, *Unemployment Insurance Statistics,* at 17 (May, 1972). Moreover, eligibility for AFDC is conditioned

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[8] The categories other than AFDC are Old Age Assistance (Title I), Aid to the Blind (Title X), and Aid to the Permanently and Totally Disabled (Title XIV).

[9] It is also worthy of note that Congress in adopting this comprehensive social welfare program, specifically adverted to its intent that public assistance not be used to meet the needs of those eligible for unemployment insurance. See *supra* at 9.

on the presence of dependent children; those without children—including childless couples and single persons—do not qualify. Persons not covered by AFDC are thus forced to fall back on local, state and county or township "emergency relief," "general assistance" or "home relief" programs. In Indiana these programs are administered by townships. See Ind. Ann. Stat. §§52-139–52-199 (Burns 1964 Repl. 1971 Supp.). Such programs have been characterized as follows:

> "General Assistance is the last operating vestige of the poor laws in Public Assistance. Since the funds for this program come from local sources, for the most part, and since the local administering body can set the rules within very broad, if any, State legal limits, there is a marked absence of broad social purpose in the programs.
>
> "This type of aid often is the only resource for many temporarily or permanently unemployable persons and persons out of work who cannot qualify for Unemployment Insurance or whose benefits under that program are inadequate or have been exhausted. However, 4 States will not pay General Assistance to a family with an employable person in the household except in certain dire emergencies.
>
> "State and local GA programs are generally more limited than the Federally aided assistance programs as to the duration and the amount of assistance paid. In 12 States, only emergency or short term assistance is given; in 14 States, aid is restricted to defined special situations. In addition, six States limit the length of time an eligible person can get General Assistance. In

many others limitations are set from time to time because of limitations on available funds. A maximum is set on the amount of General Assistance that can be given to a needy person in 14 States. Average monthly payments for all the States reporting in April 1968 amounted to $45 monthly per recipient (ranging from $3.70 in Arkansas to $75 in Pennsylvania). Money payments are made in only about one-half of the State programs; the remaining use either vendor payments or both cash and vendor payments." President's Commission on Income Maintenance Programs (Heineman Commission, appointed 1968), *Background Papers*, 279 (1969).

Thus the reliance of the Appellants on *Torres* v. *New York State Department of Labor, supra,* is misplaced. Need is not a necessary prerequisite to the attachment of due process rights, and in any event need is a very real fact for the unemployment insurance recipient whose benefits are summarily terminated. Public assistance cannot, and Congress made the judgment that it should not, be used to meet this need.

B. *Indiana's Interview Procedure Does Not Satisfy the Requirements of Due Process.*

Appellants contend that Indiana's "summary interview" procedure[10] meets the requirements of due process.[11] They advance this argument despite strong authority

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[10] See *Indiana Employment Security Division—Unemployment Compensation Claims Manual* (hereafter "*Indiana Manual*") §13620.

[11] See Appellants' Brief p. 17. This contention is also advanced by the State of California at pp. 7-13 of its Brief *Amicus Curiae.*

to the contrary[12] and without regard to the requirements of due process.

The summary interview procedure followed in Indiana is similar to the interview procedure followed in most other states. The unemployment insurance recipient reports periodically[13] for an interview at the local claims office.[14] At this interview the recipient reports orally or in writing his efforts to obtain employment and the remuneration received if employment was obtained.[15] Prior to, during, or subsequent to the interview, the interviewer may obtain information from third parties concerning the recipient's eligibility for benefits.[16] The recipient may or may not be given notice of the existence of such information, and has no right to confront or cross-examine the party from whom the information was obtained.[17] Thereafter, on the basis of information submitted by the recipient and the information gathered from third parties and other sources,[18] the interviewer or another person[19] may terminate the benefits of

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[12] A similar argument has been rejected by the District Courts. See cases cited in n. 7, *supra; contra Torres* v. *New York State Department of Labor, supra.*

[13] In Indiana recipients report at intervals of once every five weeks or once every ten weeks depending upon their alleged "attachment" to the labor market. *Indiana Manual* §§13720-13732. In addition, the recipient reports weekly to claim his unemployment insurance—in this report he fills out a card that is normally taken at face value. See *Indiana Manual* §13620.

[14] In some states, personal appearances are not always required. See *Indiana Manual* §13628.

[15] *Indiana Manual* §§13511-13628, 13720-13732.

[16] *Indiana Manual* §17330. See also Appellants' Brief p. 18.

[17] *Indiana Manual* §§17330, 17331, 17332.

[18] *Id.*

[19] *Id.* See also *Indiana Manual* §12220.

the recipient.[20] After benefits have been terminated, the recipient may request a fair hearing before an impartial referee.[21]

The contrast between this summary interview procedure, and the requirements of due process is striking. While it is true that due process is a flexible concept, it is also true that the basic requisites of due process (notice, hearing, confrontation and cross-examination, representation if desired, a decision based on legal rules and evidence, and an impartial decision maker) must be provided. Notice and hearing are, of course, most fundamental: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale,* 68 U.S. 223, 233, 1 Wall. 223, 233 (1863); see also *Grannis* v. *Ordean,* 234 U.S. 385 (1914); *Hovey* v. *Elliott,* 167 U.S. 409 (1897); *Windsor* v. *McVeigh,* 93 U.S. 274 (1876). It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965). Additionally, the hearing must include the right to confront and cross-examine adverse witnesses. *Greene* v. *McElroy,* 360 U.S. 474, 496-97 (1959). And, of course, an impartial decision maker is required. *In re Murchison,* 349 U.S. 133 (1955).

In *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) this Court analyzed the elements of due process as they applied to termination of public assistance benefits. A review of those elements as articulated in *Goldberg* provides an appropriate comparison with the summary interview procedure at issue in the case *sub judice.*

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[20] *Id.*

[21] *Indiana Manual* §19000.

Adequate and prior notice of the proposed deprivation is, chronologically, the first element of due process. 397 U.S. at 267-68. Prior to the interview, *no* notice whatsoever is given to the unemployment insurance recipient stating, much less "detailing," the reasons for a proposed termination of benefits.[22] While the unemployment insurance recipient, like the public assistance recipient, is generally aware of the conditions of his eligibility,[23] specific notice that a question concerning eligibility has arisen occurs only when the summary interview session takes place.[24] This falls short even of basic fairness.

A second essential element of due process is the hearing itself and essential to the hearing is the right to confrontation and cross-examination. *Goldberg* v. *Kelly*, 397 U.S. at 269. The Court, quoting *Greene* v. *McElroy*, 360 U.S. 474, 496-97 (1959) to emphasize that confrontation and cross-examination were "particularly pertinent" to terminations of public assistance, concluded that public assistance recipients "must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department." 397 U.S. at 270. These requisites of confrontation and cross-examination are wholly absent from the unemployment insurance summary interview procedure at issue here. As noted at p. 30, *supra*, an unemployment insurance recipient either receives no advance notice of the taking of adverse testimony and hence has no opportunity

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[22] *Indiana Manual* §§17331, 17332.

[23] Both unemployment insurance recipients and public assistance recipients must meet minimal requirements in order to maintain their eligibility for their benefits. Compare *Indiana Manual* §§13620, 13712 [unemployment insurance] with 45 C.F.R. §206.10, 36 Fed. Reg. 3864 (February 27, 1971) [public assistance].

[24] See note 22 *supra*.

to confront or cross-examine the witnesses or the recipient receives a moment's notice while the witness is contacted by telephone.[25] Hence the recipient is given no opportunity to confront or cross-examine adverse witnesses.

This absence of opportunity to cross-examine was, in part, the reason that the California procedure was found inadequate in *Crow* v. *California Department of Human Resources, supra.* See 325 F. Supp. at 13, 18. It also contrasts with the social security benefit determination hearing described by this Court in *Richardson* v. *Perales,* 402 U.S. 389 (1971).[26] In *Perales,* not only was there opportunity for confrontation and cross-examination, but subpoena power was available to the claimant. 402 U.S. at 404-05.

Since many contested unemployment insurance benefit terminations hinge on questions of fact at issue between the recipient and the employer,[27] the right to confrontation and cross-examination is even more important in unemployment insurance than it is in welfare. Again, this aspect of unemployment insurance administration is at variance with

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[25] See Appellants' Brief at p. 18 where it is stated that "information and rebuttal is usually obtained by telephone."

[26] In *Richardson* v. *Perales,* 402 U.S. 389 (1971) this Court was concerned with the substantial evidence rule at a hearing determining the eligibility of a claimant for social security benefits and not with a benefit *termination* proceeding. Distinguishing the due process requirements surrounding the *termination* of benefits in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), Mr. Justice Blackmun, writing for the Court, made it clear that the Court in *Perales* was "not concerned with the termination of disability benefits once granted." 402 U.S. at 407.

[27] In Indiana, during the period January through March, 1972, 43.6% of the hearings involved an issue of whether or not the recipient voluntarily left his previous employment and 33.5% involved an issue of whether or not the claimant was discharged for misconduct. United States Department of Labor, *Unemployment Insurance Statistics* at 7 (May 1972).

the rationale of *Richardson* v. *Perales, supra.* In *Perales* this Court, dealing with a challenge to reliance on the written reports of physicians found no "bias to the work of these independent physicians, or any interest on their part in the outcome of the administrative proceeding beyond the professional curiosity a dedicated medical man possesses." 402 U.S. at 403. No dispassionate professionalism motivates the employer to challenge unemployment insurance eligibility.[28] Confrontation and cross-examination are essential.

Another element of a due process hearing is the requirement that there be an impartial decision maker. In *Goldberg* this Court stated that the administrator initially participating in the determination should not be the decision maker in the due process hearing. 397 U.S. at 271.[29] In contrast with this requirement, the summary interview procedure at issue here allows the interviewer or claims deputy who conducts the investigation to also be the deci-

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[28] The employer is not harmed by an erroneous payment of benefits since such payments are charged not to his account, but to the general account. See Ind. Ann. Stat. §52-1537(d) (Burns 1964 Repl. 1971 Supp.).

[29] This holding was most recently applied last term in *Morrissey* v. *Brewer,* —— U.S. ——, 92 S. Ct. 2593 (1972) where Mr. Chief Justice Burger, writing for the majority, stated:

> "In *Goldberg,* the Court pointedly did not require that the hearing on termination of benefits be conducted by a judicial officer or even before the traditional 'neutral and detached' officer; it required only that the hearing be conducted by some person *other* than one initially dealing with the case. It will be sufficient, therefore, in the parole revocation context, if an evaluation of whether reasonable cause exists to believe that conditions of parole have been violated is made by someone such as a parole officer other than the one who has made the report of parole violations or has recommended revocation." —— U.S. at ——, 92 S. Ct. at 2603 (emphasis in original).

sion maker.[30] Like the caseworker in *Goldberg,* the interviewer or deputy in unemployment insurance, who has "participated in making the determination under review," cannot also be the decision maker and meet the due process requirement of an impartial decision maker. 397 U.S. at 271.

The rights encompassed in the due process clause "were designed' to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972). Conspicuously absent from the summary interview procedure are the due process requisites of adequate and timely notice, a meaningful hearing at a meaningful time, an opportunity for confrontation and cross-examination of adverse witnesses, and an impartial decision maker. Such a procedure cannot discharge the function of a due process hearing.

[30] *Indiana Manual* §§17100, 17331, 17332.

CONCLUSION

A due process hearing is required by the United States Constitution and the Social Security Act when unemployment insurance benefits are terminated. Such a hearing is, by law, tradition and logic, a prior hearing.

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